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No. 08-1472

In the Supreme Court of the United States

USA MOBILITY WIRELESS, INC.
PETITIONER,

v.

JERILYN QUON; APRIL FLORIO; JEFF QUON;
STEVE TRUJILLO,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

STATUTES

18 U.S.C. § 2510(17) 2, 3, 4

18 U.S.C. § 2711(2) 4

OTHER AUTHORITY

Supreme Court Rule 12.5 8

ARGUMENT

Plaintiffs' brief in opposition offers no persuasive reason to deny review of the Stored Communications Act ("SCA") issues in this case, if this Court grants review of the Fourth Amendment questions presented by the City of Ontario. Indeed, plaintiffs concede that the statutory issues are intertwined with, and properly inform, the Fourth Amendment analysis. Plaintiffs also offer no genuine defense of the Ninth Circuit's flawed statutory interpretation, and instead rest almost entirely on a waiver argument that is thoroughly meritless and misstates the record below.

The petition filed by the City presents constitutional issues of great importance on which the lower courts are divided, and plainly merits review. Plaintiffs' attempts to deny the circuit splits and minimize the significance of the Ninth Circuit's decision simply mischaracterize that decision or ignore the obvious import of the court's reasoning. Arch Wireless will leave those issues to the City. If this Court grants the City's petition, it should grant Arch Wireless's conditional cross-petition and consolidate the petitions for argument.

1. Arch Wireless's cross-petition explained that the Ninth Circuit misunderstood the SCA's careful (if semantically confusing) distinctions between information in "electronic storage" incident to the transmission of communications, and information maintained in computer storage for other purposes. Arch Wireless Pet. 3-6, 11-17. It also explained that the Ninth Circuit's assumption that a provider must either provide "electronic communication services" ("ECS") or "remote computing services" ("RCS"), but not both, is "impossible to square with the statutory

text." *Id.* at 2. Plaintiffs' suggestion that Arch Wireless "never identifies how the Ninth Circuit's opinion is wrong," Opp. 24, is therefore puzzling at best.

Plaintiffs endorse the Ninth Circuit's errors but conspicuously avoid any real engagement with the statutory text or legislative history. They simply assume, like the court of appeals, that "Arch Wireless clearly stores messages for backup protection based upon the undisputed evidence that they, among other things, 'archive' messages for 'recordkeeping purposes.'" Opp. 17. As Arch Wireless explained, however, information is held "for backup protection" within the unique terminology of the SCA only if it is backup for "temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17). *All* other forms of computer storage (including archives for recordkeeping purposes) constitute "remote computing services" not "electronic communication services." Those definitions are at the heart of the statute's careful distinction between active, ongoing communications (which Congress thought to be entitled to greater privacy protections, by analogy to wiretapping restrictions) and mere archived records of such communications (less private, by analogy to the rules traditionally governing information in the hands of third parties). Plaintiffs' position, like the Ninth Circuit's, improperly collapses those pivotal distinctions.

Plaintiffs are studiously vague about whether they agree with the Ninth Circuit that a company provides either ECS or RCS, but never both. At one point plaintiffs assert that since "Ontario clearly paid Arch

Wireless to provide it with the ability to 'send or receive wire or electronic communications,' or text messages" then the "service it provided was that of an ECS." Opp. 24. But Arch Wireless's role in sending and receiving text messages is not at issue in this case; rather, the case concerns its disclosure of message contents from long-term archives. To the extent plaintiffs are endorsing the Ninth Circuit's view that everything an ECS provider does is necessarily ECS, that is incorrect and unworkable for reasons explained in detail in the cross-petition (at 11-17). Forcing ECS providers to apply the ECS rules to all services they provide would result in enormous administrative burdens and ultimately cause ECS providers not to maintain any non-ECS archives at all—to the detriment of these businesses, their customers, and law enforcement. *See* Arch Wireless Pet. 21-23. Plaintiffs dismiss those costs as "the price of doing business," Opp. 25, but that is not what Congress intended.

Elsewhere in the brief in opposition, plaintiffs hint at a more nuanced argument—that Arch Wireless's storage of these messages should be governed by the ECS regime because it was somehow "incidental" to the ECS services Arch Wireless provided. Opp. 22. But of course the statute defines when storage is "incidental" to ECS in the relevant sense: only when it is "backup protection of" "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof." 18 U.S.C. § 2510(17). The archives at issue in this case clearly do not satisfy that definition—as the statutory language, legislative history, and DOJ guidelines make clear. Arch Wireless Pet. 11-17.

Finally, plaintiffs attempt to evade the Ninth Circuit's misconstruction of the statute by arguing that, factually, "Arch Wireless'[s] argument that it is both an ECS and a RCS finds no support in the record." Opp. 21. But plaintiffs do not genuinely dispute the pertinent facts—that these messages were archived in Arch Wireless's billing system to respond to potential customer inquiries, not as temporary, intermediate storage incidental to the original transmission. As explained by Steven Niekamp, Arch Wireless's Director of Information Technology, whenever Arch Wireless receives a text message over its wireless network, it keeps a temporary copy on its computer server and archives a separate copy for long-term storage. Pet. App. 3. Arch Wireless holds the temporary copy on its computer server for a maximum of 72 hours, or until the recipient pager is able to receive delivery of the message, after which the message is deleted. Pet. App. 3-4. That function is an ECS, because the temporary copy acts as "electronic storage"—holding the message for "backup protection" on a "temporary, intermediate" basis incidental to transmission. 18 U.S.C. § 2510(17). Arch Wireless maintains the *archived* copy in its billing system in order to respond to potential inquiries from subscribers regarding missed messages or the accuracy of billing statements. ER 169.[1] That long-term purpose is entirely distinct from the transmission of the message and is properly characterized as the RCS function of "computer storage." 18 U.S.C. § 2711(2); *see* Arch Wireless Pet. 14-17.

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[1] "ER" refers to the Excerpts of Record filed with the Ninth Circuit.

Plaintiffs suggest that Arch Wireless "never presented any such evidence," but what they really mean is that the evidence presented somehow does not count because it came from Niekamp's testimony. Opp. 21, 22 n.4. Niekamp is the most knowledgeable authority on Arch Wireless's technology practices, and plaintiffs presented no contrary evidence. The district court saw no genuine factual dispute, and correctly held that Arch Wireless was entitled to summary judgment on the ground that the storage in question "is not incidental to the transmission of the communication itself, and is not meant for backup protection but apparently as the single place where text messages, after they have been read, are archived for a permanent record-keeping mechanism." Pet. App. 78. Plaintiffs did not argue on appeal that Niekamp's technical testimony was factually incorrect or disputed, or that the district court erred by failing to recognize a material *factual* dispute. Plaintiffs' argument to the Ninth Circuit was that this secondary archiving could not be considered a "remote computing service" as a matter of law, because "Arch just does it, apparently for its own purposes" and "[i]t is not part of any service Arch provides (as evidenced by the Sales and Service Agreement [with the City])." Appellants' Opening Br. at 15-18. Plaintiffs even admitted at oral argument that this storage was not for "backup protection" within the peculiar meaning of the SCA.[2] And the Ninth Circuit ultimately reversed the district court's interpretation of the statute as a matter of law, with no indication that the *facts* were meaningfully disputed.

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[2] *See* Audio Recording of Oral Argument at 5:33-5:45, *available at* http://tinyurl.com/07-55285-oa ("It is unknown why the messages are archived. They were not for backup purposes . . . .").

2. Perhaps recognizing the weakness of their underlying position on the merits, plaintiffs devote most of their brief in opposition to arguing that Arch Wireless "never suggested that it provided a dual service" below and thus "the claim is now waived." Opp. 20-21. That is just false. Arch Wireless's briefing in the courts below sensibly focused on the proper characterization of the messages archived in long-term storage because the disclosure of those stored messages to the City gave rise to this litigation. Arch Wireless had no reason to brief the proper characterization of *other* services it provides but that are not in any way at issue in this case. Yet Arch Wireless never denied—and in fact acknowledged in its motion to dismiss—that it maintained certain types of unrelated temporary storage incident to transmission that would be properly defined as ECS. Arch Wireless explained to the district court that plaintiffs' complaint "contains no allegations that the 'storage' *at issue* was part of the transmission of the messages disclosed," but instead "affirmatively alleges that the storage *at issue* was of messages that had been transmitted a month before they were disclosed." ER 50-51 (emphasis added); *see also* ER 52-53 (describing messages retained during the transmission process as part of "electronic storage"); ER 317-19 n.8 (noting in Arch Wireless's brief for summary judgment that the messages at issue were not in electronic storage "at the time they were provided"). Certainly there was no need to belabor the obvious fact that Arch Wireless provides ECS when it actually transmits text messages over its network.

Similarly, there is no basis at all for plaintiffs' claim that Arch Wireless somehow invited the error of the

Ninth Circuit by affirmatively asking it "to ignore the possibility of a dual function." Opp. 20. To the contrary, Arch Wireless's Ninth Circuit brief argued that the service it provided, "*at least in part*, was a 'remote computing service,'" and that the service actually at issue here should be characterized as RCS. Arch Wireless Responding Br. 7 (emphasis added). The relevant section of Arch Wireless's Ninth Circuit brief adopts the district court's reasoning in full, and explains that "Arch Wireless acted as a remote computing service *when it divulged the subject communications*." *Id.* at 8 n.1 (emphasis added). Arch Wireless never argued that Arch Wireless "provided a RCS exclusively." Opp. 18. The only support plaintiffs muster for that accusation is a passage in Arch Wireless's brief stating that "'[c]ontrary to Appellants' contention, Arch Wireless provided a "Remote Computing Service" to the City of Ontario under the terms of the statute.'" Opp. 19-20 (quoting Arch Wireless Responding Br. 8). Obviously that is not, as plaintiffs would have it, an argument that Arch Wireless's "services could *only* be considered that of a RCS." Opp. 19 (emphasis added). The heading on the immediately prior page makes clear that Arch Wireless's argument remained, throughout, focused on the proper characterization of the disclosure actually at issue in this case. *See* Arch Wireless Responding Br. 7 heading B ("The Divulgence By Arch Wireless of the Subject Stored Communications Fell Within the Exception Provisions of 18 U.S.C. § 2702(b)(3) and Relieves Arch Wireless of Liability").

3. Plaintiffs' remaining procedural arguments have even less merit. Plaintiffs suggest that Arch Wireless is attempting an "end-around" by filing a cross-petition

30 days after the City Defendants' petition, which was "utterly silent" as to the Ninth Circuit's ruling against Arch Wireless. Opp. 16. The City was not held liable under the SCA, so it had absolutely no reason to raise SCA issues pertaining only to a codefendant in its own petition for certiorari. And Arch Wireless's conditional cross-petition was filed on the deadline established for such filings by this Court's Rule 12.5, consistent with standard practice. Indeed, if filing on the last day permitted by the Rules were somehow inappropriate, plaintiffs' brief in opposition would suffer from the same defect.

4. Plaintiffs claim that Arch Wireless "has offered no compelling reason for this Court to grant review." Opp. 23. But plaintiffs concede the crucial point—which is that the proper resolution of the SCA issues will inform the Fourth Amendment analysis. Plaintiffs affirmatively rely on the SCA in responding to the City's Fourth Amendment arguments—asserting that "[t]he fact that the Plaintiffs' text messages were protected from disclosure under the Stored Communications Act served as a legal basis for the Plaintiffs to objectively believe that their text messages would remain private." Opp. 15. Of course if plaintiffs are wrong about what the SCA means, the opposite will be true. In a thorough evaluation of the Fourth Amendment issues, this Court will inevitably confront the SCA questions underlying this litigation. This Court might as well resolve those questions, and have the benefit of briefing from the parties and *amici* most directly interested in them.

Finally, plaintiffs suggest that Arch Wireless overstates the consequences of the Ninth Circuit's erroneous interpretation of the statute. Opp. 24. But

plaintiffs' substantive argument is simply that some RCS providers will not also provide ECS, and therefore will be unaffected by this decision. *Id.* Perhaps. Today, however, pure RCS providers are rare because most businesses now archive and analyze data themselves. Regardless, plaintiffs have no response to Arch Wireless's core point: that the Ninth Circuit's reasoning will force most providers whose primary service is ECS into treating all of their *other* functions in the manner the statute requires for ECS, which will be burdensome and inconvenient—if not altogether unworkable—for the companies, their customers, and law enforcement.

CONCLUSION

For the reasons set forth above, if this Court grants review of the Fourth Amendment issues presented in the City Defendants' petition, then it should also grant this cross-petition.

Respectfully submitted,

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